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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EMMETT EUGENE CLOUD, JR.,
Petitioner,

v.

DON BYRD, Sheriff of Dallas County, Texas,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a Defendant in a criminal case has a constitutional right under the Sixth Amendment Confrontation Clause to cross-examine a police officer, the star prosecution witness, about an administrative determination by the police department that the officer lied in official police reports about a separate incident and the officer's resulting discipline.

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The Petitioner, Emmett Eugene Cloud, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding.

OPINIONS

The opinion of the United States Court of Appeals is reported at 627 F.2d 742 and is also included in Appendix A. The District Court for the Northern District of Texas adopted the unreported findings, conclusions and recommendation of the United States Magistrate, which are included in Appendix B. The opinion of the Court of

* Don Byrd replaced Carl Thomas as Sheriff of Dallas County, Texas on January 1, 1981.

Criminal Appeals of Texas on the prior direct appeal is reported at 567 S.W.2d 801 and is also included in Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 10, 1980. A timely petition for a rehearing was denied on November 13, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

Amendment XIV:

Section 1. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The petitioner, Emmett Eugene Cloud, Jr., was tried in a Dallas County criminal court for the offense of public lewdness. He was found guilty by a jury and assessed a punishment of confinement in the Dallas County Jail for six (6) months and a fine of $1,500.00. The prosecution's case rested entirely on the testimony of the arresting Dallas police officer who testified that on April 25, 1975 he saw petitioner engaged in a homosexual act in the steam room

of a Dallas health studio, while the officer was conducting a raid as an undercover vice officer. The petitioner, testifying in his own defense, denied commission of the act. Petitioner, age 26, had previously never been convicted of any offense.

During the trial on March 22, 1976, the petitioner was prohibited from cross-examining the police officer about his filing a false official police report in another matter and the resulting administrative discipline imposed by the Dallas Police Department.

In a hearing outside the presence of the jury, the police officer admitted that on December 8, 1975, he made a false police report regarding a fellow vice officer to the effect that while he was operating undercover he had not heard a gun shot when in truth he had. In administrative proceedings, the police department determined that he had lied in filing such a report when he was expected to tell the truth. The police officer was suspended with loss of pay for fifteen (15) days. After completion of his suspension, the officer was transferred from vice to traffic, where he was still assigned at the time of trial.

The trial court excluded the evidence on the basis that Texas rules of evidence permit evidence of criminal convictions only and not other acts of misconduct.

On direct appeal, the Texas Court of Criminal Appeals held that the trial court could admit the evidence to show a possible bias of the officer but that it did not abuse its discretion in refusing to admit the evidence. The Court of Criminal Appeals thought that it was far from clear that the excluded testimony would have discredited the officer because he had filed the initial charges against the

petitioner prior to the events that led to the officer's suspension. The court noted that petitioner cited *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105(1974), but it failed to discuss the implications of that case. A dissenting judge stated that under *Davis v. Alaska*, the petitioner was deprived of his right to a reasonable cross-examination to explore the officer's possible bias or motive for testifying against the petitioner. 567 S.W.2d 801.

Petitioner then filed an application for writ of habeas corpus in the Northern District of Texas under 28 U.S.C. §2254. The district court denied the application. In the magistrate's finding and conclusions adopted by the court, the court concluded that while at first blush the argument that the officer could have been attempting to curry favor with his superior by his testimony was appealing, the evidence had little probative value since the officer arrested the petitioner prior to the incident that led to the disciplinary action against the officer.

On appeal the Fifth Circuit, in contrast to both the Texas Court of Criminal Appeals and the federal district court, held that there has been no suggestion before the state courts or it that the excluded [testimony] would show "any biases, prejudices or ulterior motives", rather the sole justification for the evidence was a general propensity to be untruthful. The Court of Appeals concluded that the Sixth Amendment is not co-extensive with the Federal Rules of Evidence and does not require the admission of evidence supporting a general inference that he who lies once may lie twice. 627 F.2d 742.

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit drastically limits the opportunity for a defendant to test the credibility of police officers testifying against the defendant.

It is not uncommon in modern criminal trials for the fact-finder at some stage of the criminal proceedings to have made a critical decision based upon the unsupported and conflicting testimony of a police officer and the accused. In this case, the jury found the petitioner guilty after hearing testimony of a police officer that he saw petitioner engaged in prohibited sexual activity and testimony of the petitioner that he had not engaged in such activity. The entire question of guilt swung on which witness the jury found more credible — which one they would believe.

> In mass societies, people deal routinely and for the most part with people who are either casually known to them, or strangers. As a result they are often unable to make judgments based on facts, past biographies or experience bearing on the credibility of the people they encounter in everyday life. Except with close friends or colleagues, they are constrained to rely on impressions, intuitions, or on generalized typifications of persons to assess others' moral character and the veridicality of their statements. Manning, "Police Lying." 3 Urban Life & Culture 283 (Oct., 1974).

Thus, people tend to categorize classes of people to rank their credibility.

> In . . . situations where it is one man's word against another, and where the issue has to be settled, it is normally the man who stands highest in the *dominant hierarchy of credibility* whose word is accepted. Box & Russell, "The Politics of Discreditability: Disarming Complaints Against the Police," 23 Sociological Rev. (New Series) 315,333 (May, 1975).

Viewed in this perspective, the question became which type of person would the jury believe — an accusing police officer or an accused homosexual.

In general, the police enjoy a good reputation. According to a Gallup poll in 1967, 77% of the persons surveyed had a "great deal" of respect for the police and another 17% had "some" respect for them. 3 G. Gallup, The Gallup Poll, Public Opinion 1935-1971, 2077 (1972). In 1965, 70% had a "great deal" of respect for the police and 22% more had "some" respect. *Id.* at 1935. In a 1977 poll rating the honesty and ethical standards of people in twenty different fields, policemen obtained the sixth highest ranking, just slightly below bankers. Their rating was significantly higher than such fields as lawyers, U.S. Senators, business executives, congressmen and state and local office holders. 2 G. Gallup, The Gallup Poll, Public Opinion 1972-1977, 1196-97 (1978).

The few studies of jurors regarding such aspects agree with Dr. Gallup's report of the public's perceiving police as having high credibility. A Yale Law Journal field research project involving a 149-case sample of suits under 42 U.S.C. §1983 against Connecticut police for alleged misconduct concluded that the juries began with a pro-police bias. "An analysis of juror comments, along with the observations of experienced attorneys and judges, presents substantial evidence of a pro-police bias." Project, "Suing the Police in Federal Court." 88 Yale L.J. 781, 800 (1979).

Social psychologists who worked in the nationally reported Joan Little case of a few years ago, made a similar assessment. McConahay, Mullin & Frederick, "The Uses of Social Science in Trials With Political and Racial Overtones: The Trial of Joan Little," 41 Law & Contemp. Prob. 205, 217 (1977). In discussing the application of social science in the case, they explain their use of the psychological theory of the "authoritarian personality" to assist picking the jury. "According to this theory . . . extreme

authoritarians are rigid, . . . highly punitive individuals who will accept the word of an authority figure over that of a lesser person." They used an authoritarianism rating scale ranging "from a low of zero which represented minimum authoritarianism to a high of thirty which represented maximum authoritarianism. The neutral point between high authoritarian and low authoritarian behavior was fifteen. [Richard] Christie's experiences in a number of trials suggested that the average American rated about twenty on this scale of authoritarianism. . . . The average rating assigned by our observers to all persons who were interviewed for Ms. Little's jury was 21.02, which is not very different from the general American population." *Id.* 217-18.

The National Jury Project advises petitioner that they know of five surveys of the public made in various states in connection with pending criminal cases that asked whether policemen are more trustworthy and honest than other people. In each of those surveys the majority agreed that policemen are more trustworthy and honest. Letter to Malcolm Dade from National Jury Project, Western Regional Office, 2054 University Avenue, Suite 402, Berkeley, California, dated November 14, 1979.[1]

Contrasting with the public's favorable opinion of the honesty of policemen is its attitude toward purported homosexuals, The Yale Law Journal project reports that

[1]National Jury Project advises petitioner that in a 1975 survey conducted in Beaufort County, N.C., in connection with the Joan Little trial, 65% of those polled said they would believe a policeman more than almost anybody else; in a 1976 survey in Passaic County, N.J., in connection with a trial of Rubin Carter and John Artis, 57% agreed; in a 1974 survey in Monroe County, Wisc., in connection with *State v. Mendoza*, 63% agreed; in another survey in Wisconsin for an anticipated trial 59% agreed; another survey in Alachua County, Fla., in connection with the trial of Scott Camile, 51.9% agreed.

in suits against police officers jurors not only had a pro-police bias but also were biased against persons with "deviant or unusual lifestyles." 88 Yale L.J. at 796-99.

Such a deviant group are homosexuals. According to a report of findings of a four-year investigation supported by the National Institute of Mental Health, the majority of American adults tend to see homosexuals as different "from the rest of us." Levitt & Klassen, "Public Attitudes Toward Homosexuality." 1 J. Homosexuality, 29, 32-35 (1974). Indeed, of the 30,018 American adults sampled, 52.3% did not think that homosexuals should be regarded as any other group, and 80.9% would not associate with homosexuals if they could help it. *Id.* at 42. In addition, large majorities (67% to 77%) opposed permitting homosexuals to work in professions involving public responsibility, particularly involving moral leadership. *Id.* at 32. A high majority (71%) also perceived homosexuals as a danger to children. *Id.* at 34. In general, about 84% thought that homosexuality is obscene and vulgar. *Id.* at 34.[2]

The impact of being labeled a "homosexual" in our society was studied experimentally on a group of college men. Karr, "Homosexual Labeling and the Male Role," 34 J. Social Issues, 73 (Summer 1978). The study showed that merely labeling men "homosexuals" reduced their rankings by the other men participating from a preferred ranking to a least preferred ranking. Karr further reports that "the most intriguing result was the man who performed the actual labeling was perceived by the other men in the group as both

[2]Levitt and Klassen's findings were confirmed by the separate analysis of Nyber and Alston, "Analysis of Public Attitudes Toward Homosexual Behavior," 2 J. Homosexuality 99 (1976-1977). Nyber and Alston further conclude that moderation in public attitudes has not occurred.

significantly more masculine and significantly more sociable than when the same man did not apply the homosexual label." *Id.* at 82.

Thus, the average juror is much more likely to believe a police officer than an accused homosexual, but juror's pro-police bias is not necessarily well-founded. The President's Commission on Law Enforcement & Administration of Justice reported that while a high degree of honesty is perhaps more important for police than any other group in society, studies have revealed significant numbers of officers engaging in varying forms of illegal and unethical conduct. Task Force Report: The Police, 208 (1967).

One form of such conduct is a police officer lying or distorting the truth in order to obtain a conviction. The organizational ends — convictions — become more important than the means to attain them. Barker, "Peer Group Support for Police Occupational Deviance," 15 Criminology 353,359 (1977). Although it would certainly be nigh impossible to statistically measure the incidents of police perjury, there are strong indications that it is not uncommon.

Both the Knapp Commission and a State Investigation Commission found that the existence of informal arrest quotas in the New York City Police Department led to officers framing suspected individuals or "obvious" law violators in order to meet their quotas. The Knapp Commission Report on Police Corruption, 28 (1972).

Commentators writing from extensive personal observations of big city police departments agree. One observer says that perjury is a way of life for making arrests and cases in the vice control area. J. Rubinstein, City Police, 385,392 (1973). Another observer of the New York City

police devotes an entire chapter to framing defendants and committing perjury in order to convict persons perceived as undersirable and in order to maintain or advance the officer's career. P. Chevigny, Police Power, 147-80 (1969). In a separate chapter Chevigny discusses police perjury to support a search and seizure.

A particularly frequent problem in this area is the so-called "dropsy testimony"[3] common in drug cases. Professor Irving Younger writes that there is usually no particular reason to disbelieve the officer's testimony in any one particular case. However, upon looking at the flood of dropsy testimony cases, he concludes, "It then becomes apparent that policemen are committing perjury at least in some of them, and perhaps in nearly all of them." Younger, "The Perjury Routine," 1967 The Nation, 596 (1967).

The impressions that Younger and Chevigny developed by observing series of individual cases are supported by statistics obtained in a study of narcotics arrests in the Borough of Manhattan during two six-month periods before and after the Court's landmark decision in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct 1684 (1961) (The periods were September 15, 1961 — March 15, 1962). Barlow, "Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62," 4 Crim.L.Bull. 549 (1968). During the pre-*Mapp* period there were 2,291 arrests with dropsy incidents reported in 306. In the post-*Mapp* period the total arrests dropped to 1,680 but the report of dropsy incidents increased to 481. *Id.* at 552 and 556. Analysis of these figures is extremely instructive. From the pre-*Mapp* period to the

[3]"Dropsy testimony" occurs when an officer testifies that he saw the defendant try to get rid of the illegal substance by dropping it to the ground. The defendant almost always testifies that he did not drop the substance and that the officer acquired the substance by searching the accused.

post-*Mapp* period, arrests decreased 26.7%, but alleged dropsy incidents increased 57.2%. In the pre-*Mapp* period dropsy cases comprised 13.4% of the arrests; in the post-*Mapp* period they comprised 28.6%. The change in the proportion of dropsy cases to all arrests increased an amazing 113.4%! A statistical analysis shows the probability that such a change was due to chance is infinitesimal.[4]

Younger concludes in an opinion written as a state judge, "Beyond any doubt, then, the problem exists." *People v. McMurty*, 314 N.Y.S.2d 194,197 (N.Y.C.Crim.Ct. 1970). See also, Comment, "Police Perjury in Narcotics 'Dropsy' Cases: A New Credibility Gap," 60 Geo.L.J. 507 (1971). Judge Wright of the United States Court of Appeals for the D.C. Circuit has come to a similar conclusion regarding testimony of defendants "spontaneously and voluntarily" apologizing to victims in the presence and custody of police.

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[4]The data of the two periods can be analyzed by using the chi-square test.

	Dropsy	Non-D	Total Arrests
Pre-*Mapp*	(a) 360	(b) 1,985	2,291 (a&b)
Post-*Mapp*	(c) 481	(d) 1,199	1,680 (c&d)
	(a&c) 787	(b&d) 3,184	3,971 (N)

The formula used was

$$X^2 = \frac{(|ad-bc| - \frac{N}{2})^2 N}{(a\&b)\ (c\&d)\ (a\&c)\ (b\&d)}$$

Dixon & Massey, Introduction to Statistical Analysis, 242 (3rd Ed. 1969).

The calculation using the figures in table above gives $X^2 = 141$ (rounded off to whole numbers).

For this problem, the 5% level of significance is
$X^2 = 3.84$; the 1% level of significance is
$X^2 = 6.63$ and the ½% level of significance is
$X^2 = 7.88$.

The probability of this result occurring is roughly 7×10^{-33}!

Veney v. United States, 344 F.2d 542 (D.C.Cir. 1965) (Wright concurring).

These conclusions are further supported by an empirical study of police deviance conducted by Dean Barker of the police department of a southern city of over 25,000 population located east of the Mississippi River. Barker, "An Empirical Study of Police Deviance Other than Corruption," 6 J. Police Sci. & Ad. 264 (1978). According to Barker's study, the police officers themselves believe almost 23 percent of their department have lied in court. *Id* at 270. The study further showed that the police officer who commits perjury in court does so with little risk of being reported by his brother officers! *Id.* at 271.

Of course, none of this means that every police officer will commit perjury in every case, but a significant problem does exist. Mere recognition of the problem, however, does not help to solve it. Despite having written on the problem, three years later Younger was unable to effectively cope when faced with dropsy evidence as a criminal judge. *People v. McMurty*, 314 N.Y.S.2d 194. Faced with conflicting dropsy testimony of the officer and defendant, Judge Younger, having trouble deciding who was telling the truth, ruled for the state based on burden of proof and thus avoided deciding whether the officer was telling the truth or not. If a skeptical Judge Younger has difficulty in deciding whether a police officer is lying, no wonder jurors, who start with a pro-police bias, will take a policeman's word over that of the defendant.

When police perjury does occur (which appears to be rather frequently), how can an innocent defendant persuade the jury when it is just his word against the officer's? There is no simple solution for this problem; however, the decision

of the Fifth Circuit in this case further aggravates the problem.

To the jury the officer starts out as more worthy of belief than the defendant. If an officer has already abused his position, the defendant must be able to show this to the jury so that the jury can have a true perspective from which to weigh the credibility of the two.

In *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct 1105 (1974), the Court held that a defendant was denied his right under the confrontation clause to adequately cross-examine a key prosecution witness.

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

Davis had not been permitted to reveal that the witness who identified him had been on probation for a juvenile delinquency adjudication for burglary. The Court held that Davis had not been permitted to show why the witness could have been biased or otherwise motivated to falsely accuse Davis.

The Fifth Circuit's refusal to apply the teaching of *Davis* in the instant case greatly restricts the right of defendants to cross-examine police officers regarding motivations they might have in testifying against the defendant. The Fifth Circuit's limitation of *Davis* is directly contrary to the deci-

sion of the Sixth Circuit in *United States v. Garrett*, 542 F.2d 23 (6th Cir. 1976).[5]

The chief witness in *Garrett* was an undercover police officer who testified that Garrett arranged to distribute drugs to him. Subsequent to the alleged incident but prior to the trial, the officer was suspended from duty as a police officer for refusing to take a urine test to determine if he had used hard drugs. The trial court permitted Garrett to cross-examine the officer as to the fact that he was suspended and the length of the suspension and as to whether he had been involved in the use or sale of drugs on the dates of the alleged transactions involving Garrett. Garrett was not permitted to reveal why the officer had been suspended.

The Sixth Circuit noted that the officer "might well have looked upon a successful prosecution of Garrett as a means of having his suspension lifted and being returned to full duty as a police officer." *Id.* at 26. It then held that with such a possibility of bias Garrett was entitled to develop fully the circumstances of the officer's suspension.

The Fifth Circuit attempts to distinguish *Garrett* on the basis that it dealt not with a general attack on credibility but was instead "an example of a more particular attack relating to issues and personalities in the case at hand. . . ." In contrast, it relegates the attack in the instant case as one that would not "make the policeman's testimony suspect aside from the general inference . . . that those who lie once

[5]The Fifth Circuit says that in *Garrett* the Sixth Circuit found the restriction on the cross-examination a violation of the Federal Rules of Evidence and, in dicta, also a Sixth Amendment denial. 627 F.2d 744. Petitioner disagrees. While the Sixth Circuit could have considered the Federal Rules of Evidence, it did not mention the rules in the *Garrett* opinion. Instead, it repeatedly referred to the Sixth Amendment and the *Davis v. Alaska* opinion.

may lie twice." 627 F.2d at 745.[6] The distinction is without a rational foundation.

In both cases the officers were disciplined for separate matters and suspended. The only distinction is that in

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[6]The Fifth Circuit also indicated that petitioner intended to use the excluded evidence solely "to show that the officer has a propensity to be untruthful. There was no suggestion before the state court or this court that cross-examination would show any 'biases, prejudices, or ulterior motives' on the part of the officer. . . ." 627 F.2d at 743. Petitioner's counsel at trial told the trial court, "This witness's credibility is in question here and if he has been discipline [sic] within his own department for being untruthful, we have a right to put that in evidence here." *Id.* n.1. Attacks on credibility can be either general or more specific. While the excluded evidence could be used as a general attack in the manner adopted by the Fifth Circuit, it can also be used to support a specific attack as set forth in this petition. The trial attorney did not limit the manner in which he intended to use this evidence. Furthermore, the evidence regarding the discipline taken against the officer and its continuing effects — transfer back to traffic — was only meaningful as part of a specific attack to show an ulterior motive for the officer to testify against the petitioner. The Texas Court of Criminal Appeals clearly recognized that petitioner's use of excluded evidence was directed at showing bias. *Cloud v. State*, 567 S.W.2d at 802-03. The Court of Criminal Appeals justified the exclusion as within the trial court's discretionary power because it was speculative to say it would change the officer's testimony. The federal district Court also recognized that petitioner's argument included a motivation on the part of the officer to testify against petitioner in order to curry favor with his superiors. See Appendix B. In his brief to the Fifth Circuit, petitioner did not explicitly discuss the types of potential bias on the part of the police officer that the excluded evidence might show because the possibility of bias being shown by the evidence had already been recognized by both the Texas Court of Criminal Appeals and the federal district court. Petitioner did argue in his brief "that the particular facts of this case indicate the possibility of bias on the part of the only witness against Appellant and that such evidence of bias is admissible to discredit this witness . . . ." Petitioner believes that the potential bias was also mentioned during oral argument. While the potential bias might have been better expressed before the state trial court and the Fifth Circuit, the court erred in concluding that petitioner's attack was limited to a general attack on credibility.

Garrett the officer was still on suspension at the time of the trial, while in the instant case, the officer had been reinstated to active duty but transferred to a lesser assignment. In both cases, the officers had to be concerned about their careers with their respective departments. After a seven year career in which the officer in this case had finally worked his way up to the vice control division, he was relegated back to the traffic division. He might well have been concerned about what long-range impact the disciplinary action would have on his career, and he could have considered a record of convictions resulting from his arrests as a means of regaining favor with his superiors to advance his career beyond the traffic division. There is not substantial difference between the possible bias of this officer and the one in *Garrett.*[7]

The Fifth Circuit's narrowing of the *Davis* teaching is also contrary to the Eighth Circuit's interpretation of *Davis* in *Johnson v. Brewer*, 521 F.2d 556 (8th Cir. 1975). Like this case, *Johnson v. Brewer* was a federal habeas proceeding regarding exclusion in the state trial court of evidence by which the defendant sought to discredit a key prosecution witness. Johnson had not been permitted to present extrinsic evidence to show that the prosecution witness, a professional informer, had been used in the same capacity by

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[7]The Second Circuit has taken a position similar to the Sixth Circuit in *United States v. Miles*, 480 F.2d 1215 (2d Cir. 1973), where the prosecution relied on the testimony of a detective who had been suspended from the New York City Police Department and had several charges pending against him. "Although witnesses cannot generally be impeached in this circuit by evidence of prior misconduct — as opposed to evidence of prior convictions —, . . . the district court properly allowed the defendant to show the nature of the serious charges for which [the detective] had been suspended, since [the detective] might have been motivated to testify in a manner that would ingratiate himself with his superiors."

police in another state, and that the district attorney in the prior state had dismissed a case after discovering that the informer had "framed" the accused. Relying on *Davis v. Alaska*, the Eighth Circuit held that the state court's exclusion of such evidence denied the defendant an adequate cross-examination because the jury could have reasonably found inter alia several different forms of bias from that evidence.[8]

The reasoning of the Eighth Circuit is directly applicable to this case[9] and is contrary to that of the Fifth Circuit.

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[8]The Eighth Circuit held that the jury could have found bias reasoning as follows:

(1) Informant may have needed work and therefore felt that he needed to produce for his new government employer thereby being tempted to engage in a quick frame to demonstrate his utility.

(2) The informer might believe that his past experience would keep him from being employed by other governments and might subject him to extensive surveillance. To avoid that he might do *anything* to remain in the good graces of some state government as a source of protection.

(3) Any informant who would set up a totally innocent man for conviction of a criminal offense may be so prejudiced of anyone *suspected* of narcotics dealings that a frame would never seem unjustifiable to such an informant.

(4) In Michigan the informer apparently used the frame to cover his attempted diversion of funds provided him for the purchase of narcotics for his girlfriend. He might have done the same thing in this case.

(5) The witness who deliberately lies about the commission of criminal acts against the government that pays him must assume that lies are acceptable means to meet the end for which he is paid, i.e., convictions, and that he may believe that getting caught in the lie, not lying, was his mistake. The next time he may be harder to catch.

[9]The jury in this case could have reasoned as follows:

(1) The arresting officer might feel it important to regain the good graces of his superiors and believe that a conviction in this case would be helpful to him in getting back into the vice control division or receiving subsequent promotions.

Even if the excluded testimony were intended to be a general attack on the credibility of the witness, it would be appropriate for the Court to take this case to decide to what extent a criminal defendant has a right under the Confrontation Clause to make a general attack on the credibility of a key state's witness.

In *Davis v. Alaska*, the Court held

> . . . defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. 415 U.S. at 318, 94 S.Ct. at 1111.

In *Davis* the Court pointed out that there are two types of attacks on the credibility of a witness — a general attack on the propensity of the witness for truthfulness or lack of, and a more particular attack directed toward revealing possible biases, prejudices, or ulterior motives of the witness. In *Davis* the Court addressed the constitutionality of excluding cross-examination indicating a possible bias. Although the Court did not specifically consider whether there

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(2) After having been disciplined once for lying in the official line of duty, the arresting officer might be concerned about further disciplinary actions for his earlier accusations if the petitioner is not convicted.

(3) A police officer willing to lie in official reports to help the careers of other officers, might be likely to lie to advance his own career also.

(4) A vice officer who is willing to lie about activities involving vice officers and suspected offenders may be so prejudiced against anyone who attends suspected homosexual hang-outs that a frame would not seem unjustified to that officer.

(5) An officer who deliberately lies in official reports about incidents involving vice officers and suspected offenders may assume that lies are an acceptable means to "control vice," and that he may believe that getting caught in a lie, not lying, was his mistake.

is a constitutional right of confrontation to make a general attack on a witness's credibility, its analysis is applicable to cases such as this.

This case comes down to the jury simply choosing one person's word over another's. The prosecuting witness, however, is a police officer whose word is given greater credence by the average American, not due to any intrinsic virtue of the witness himself, but simply due to his position. A jury could reasonably expect to hear about anything that might detract from a policeman's expected credibility. Mere lack of evidence adverse to the officer's credibility might very well reinforce the jury's initial pro-police bias to the extent that it might consider the officer's testimony to be beyond reproach. Furthermore, the officer's labeling of the defendant as a homosexual both enhances the officer's acceptability and decreases the defendant's acceptability.

Such may be unavoidable, but it should not be permitted when it can be shown that the officer has a history of abusing his position.

By and large it is the police who file the vast bulk of criminal complaints. Thus, they usually make the initial decision about whether to begin the criminal justice process. A civilian who filed a false police report, a violation of Texas law, would probably have a criminal charge filed against him by the police department. In stark contrast, the police department took only internal administrative action against this officer for his false official report.

Such a decision is not uncommon. Many police officials desire to resolve police misconduct quietly within the department itself. Task Force Report: The Police, *supra*, at 214. There are several self-serving reasons for a decision to handle police misconduct internally instead of through criminal process.

First, the mere filing of criminal charges may result in unfavorable publicity thereby creating a bad image for the department. Police officials naturally desire to enhance the department's image and would be reluctant to take action having a negative effect on that image.

Secondly, if a Texas peace officer is convicted of a felony, he loses his accreditation as a peace officer. Police officials faced with shortages of officers may not want to risk losing officers they have.

Thirdly, police officials do not want to spoil cases already made. They know that under Texas evidentiary law a conviction for a felony or a misdemeanor involving moral turpitude may be used to impeach a witness. They know further that if they file charges against one of their officers for filing false police reports, they may cause that officer to be subject to impeachment and thereby risk spoiling all the cases in which that officer is a key witness. They do not want to undermine the officer's credibility as a state's witness.

All of these institutional reasons militate against a police department filing criminal charges against one of its own officers except in extreme cases. Hence, some police officers may have a better image than they deserve.

Police officers, like other employees, are often faced with the requirement to "produce." For a policeman "producing" means making arrests and obtaining convictions. To make an appropriate number of arrests, the officer may believe that it is necessary to "bend the truth" or lie in order to catch the "obvious offender."

One commentator has noted. "Undercover policework *requires* a deceptive strategy. In the vice enforcement situation, the policeman is authorized and structurally con-

strained to present himself to a variety of audiences in a deceptive fashion. . . ." Manning, "Police Lying," 3 Urban Life & Culture at 294. He concludes that such "Rashomon" experience loosens the tie between morality and the law and between duty to the citizenry and duty to oneself or other policemen. *Id.* at 297. Rubinstein contends that perjury is a way of life for making arrests and cases in the vice control area. Rubinstein, City Police at 392. Indeed, the officers may even justify their conduct to compensate for their perception of the deficiencies of the liberal courts who turn criminals loose. Butler & Cochrane, "An Examination of Some Elements of Personality of Police Officers and their Implications," 5 J. Police Sci. & Ad., 441, 449-50 (1977).

Under the Fifth Circuit's analysis, a police officer may continue to lie to support arrests and obtain convictions without fear of impeachment no matter how many times he gets caught and administratively disciplined, so long as he does not receive a criminal conviction. Thus, the Fifth Circuit permits the police to insulate themselves from exposure of their misconduct which bears on their credibility. This allows a false picture to be painted for the jury of a dedicated, honest policeman testifying for the state, even when that officer might have a record of being caught lying in his official duties numerous times.

"Deceit on the part of the police officer gains much of its power from the fact that it issues from the lips of one supposedly above reproach and acting as government official in his official capacity . . . one expects the 'criminal' to lie but one does not expect an 'officer of the law' to lie." Manning, *supra*, 3 Urban Life & Culture at 286, quoting Buckner, "The Police: The Culture of a Social Control Agency," Ph.D. dissertation, U. of California, Berkeley (1967).

When police fabricate evidence, it is done in belief that their discredibility is comparably low. Calling a policeman a liar is outrageous, but everyone knows social deviants, such as homosexuals, are pathological liars. Box & Russell, "The Politics of Discreditability," *supra*, 23 Sociological Rev. (New Series), at 333-34.

This Court should take this case to decide whether under such circumstances a criminal defendant is entitled under the Confrontation Clause to impeach a police officer who is the star prosecution witness by showing that the officer has administratively been found to lie in connection with and in the performance of his official duties.

Such evidence would permit a jury to place the conflicting witnesses in a more accurate perspective when weighing their credibility.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 1981, three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to: District Attorney of Dallas County, Texas, Attention: Steve Bush, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas 75202, Counsel for Respondent. I further certify that all parties required to be served have been served.

Malcolm Dade

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Counsel for Petitioner

APPENDIX A

Emmett Eugene CLOUD, Jr.,
Petitioner-Appellant,

v.

Carl THOMAS, Sheriff, Dallas County, Texas,
Defendant-Appellee.

No. 79-3368.

United States Court of Appeals,
Fifth Circuit.

Oct. 10, 1980.

Rehearing Denied Nov. 13, 1980.

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN, HENDERSON and REAVLEY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge.

[1] Emmett Eugene Cloud, Jr. was arrested in the steam room of a Dallas health studio on a charge of public lewdness and convicted by a Texas jury. The prosecution's case rested entirely on the testimony of a single witness, the arresting officer. Cloud's petition for habeas corpus asserts that the trial judge's refusal to permit cross-examination of the officer concerning a prior incident that had resulted in the officer's suspension violated Cloud's sixth amendment right to confront the witnesses against him. Because the petitioner has no *constitutional* right to impeach the general credibility of a witness with evidence of prior bad acts, we AFFIRM the District Court's denial of the writ.

Between the time of Cloud's arrest and trial, the arresting officer filed a false report in an unrelated "vice undercover operation." The officer was suspended and later reassigned

to the traffic patrol, but no criminal charges were brought. In the absence of a criminal conviction, the trial judge refused to permit cross-examination into the incident. Defense counsel objected on the sole ground that his client had a right to show that the officer had a propensity to be "untruthful." There was no suggestion either before the state court or this court that cross-examination would show any "biases, prejudices, or ulterior motives" on the part of the officer, *Davis v. Alaska*, 415 U.S. 308, 317, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347, 354 (1974), or that cross-examination would accomplish anything more than a refutation of the officer's credibility.[1]

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[1]The following colloquy took place between the trial judge and defense counsel after a proffer of cross-examination on the suspension:

THE COURT: Just in order to let the record reflect what we are doing, I will now hear the Defendant's argument for why they think that this testimony is admissible in view of the State's Motion in Limini. I would like for you to site (sic) your authorities which I instructed you this morning to have ready to show that you can impeach a witness by something other than a conviction for an offense. When you site me that authority, I am ready to hear your argument.

[Defense Counsel]: Your Honor, the Defendant has no authority for such proposition. *This witness' credibility is in question here and if he has been discipline (sic) within his own department for being untruthful, we have a right to put that in evidence here.*

THE COURT: You have no authority for that, this is a case of first impression as far as you are concerned.

[Defense Counsel]: We are testing this witness' credibility and we have a right to go into it.

THE COURT: Counsel, this Court would have to assume that if that were the law, that anybody could call any witness' wife or spouse up here, and I don't think there is anybody in the world who hasn't lied to your spouse at one time or another. Unless you get into some matter that shows some kind of a conviction, the Court will sustain the objection and rule that the matter is not admissible in front of the jury. *Now I thought I made that very clear this morning, that if you had any authority, I want to hear it now. That is not to say that before this trial is over with, if you show me some*

While the Federal Rules of Evidence permit a criminal defendant, at the discretion of the court, to impeach the credibility of a hostile witness with evidence of prior instances of dishonesty (see Fed.R.Evid. 608), we find no authority for the proposition that a defendant has a constitutional right to attempt such impeachment. In *Davis v. Alaska, supra*, the Supreme Court found a sixth amendment violation in a state judge's refusal to permit cross-examination into the partiality of a key prosecution witness. The witness had been adjudicated a juvenile delinquent; his probationary status at the time of Davis' trial might have motivated the witness to identify Davis as the culprit in order to shift suspicion from himself and prevent possible revocation of probation. Noting that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination," *Id.* at 415 U.S. at 316, 94 S.Ct. 1110, 39 L.Ed.2d at 354, the Court held that prohibiting an exploration into a witness's possible reasons for falsifying testimony was an error "of the first magnitude and no amount of showing of want of prejudice would cure it." *Id.* at 415 U.S. at 318, 94 S.Ct. 1111, 39 L.Ed.2d at 355.

[2] Under *Davis*, cross-examination must be permitted into any incentive the witness may have to falsify his testimony. Here, the petitioner has failed to advance such an

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authority for your position, that I won't change my ruling and then let you go into it, but until you show me some authority the Court holds that the mere fact that someone may have made some false statement to someone in the past, which has not resulted in a final conviction, it is not admissible in this State as far as I have been able to determine.

Does anybody want to ask any further questions of this witness before I bring the jury back in?

[Defense Counsel]: Please note our exception.

(Emphasis Supplied).

incentive. Instead, the petitioner argues that the fact that the witness lied before may be introduced to show that the witness is lying now. While *Davis* mentions the traditional importance of allowing the cross-examiner to discredit a hostile witness, *Id.* at 415 U.S. at 316, 94 S.Ct. 1110, 39 L.Ed.2d 354, it nowhere holds that the sixth amendment requires the admission of all character evidence of whatever relevance and probative value. Compare *Truman v. Wainwright*, 514 F.2d 150 (5th Cir. 1975), a post-*Davis* decision in which a panel of this court, without referring to *Davis*, said "it is firmly established in this circuit that a witness may not be impeached by inquiry into specific acts of misconduct not resulting in a conviction."

In *United States v. Hitchmon*, 609 F.2d 1098 (5th Cir. 1979), a panel of this court found a refusal to permit cross-examination reversible error under the Federal Rules of Evidence. The trial judge had refused to allow cross-examination concerning an internal DEA investigation of two of the principal witnesses. The investigation concerned whether the two witnesses had given perjured testimony in an earlier trial of the same defendant on the same charge. The panel opinion noted: "That the agents were subject to disciplinary action if they agreed with appellants' depiction of the facts is also something that the jury may have wanted to know in deliberating about the credibility issues." This did not involve the constitutional standard. Moreover, the cross-examination concerned whether the witnesses had testified untruthfully in an earlier trial of the same defendant on the same charge, an issue not wholly collateral to the trial.

In *United States v. Garrett*, 542 F.2d 23 (6th Cir. 1976), the Sixth Circuit found failure to permit cross-examination a violation of the Federal Rules of Evidence and, in dicta, also a sixth amendment denial. The cross-examination was an effort to establish that the police officer had been suspended

from the force for refusing to submit to a urine test that would reveal the use of narcotics. However, the court noted "there is no way to determine whether . . . facts might have been disclosed by an examination of [the witness'] disciplinary proceedings which would be the possible basis for reasonable inferences of bias or an interest in the outcome of the Garrett prosecution. [The witness] might well have looked upon a successful prosecution of Garrett as a means of having his suspension lifted and being returned to full duty as a police officer." *Id.* at 26. It also commented: "Reliance on [*United States v. Norman*, 402 F.2d 73 (9th Cir. 1968), *cert. denied*, 397 U.S. 938, 90 S.Ct. 949, 25 L.Ed.2d 119 (1970) and *United States v. Cardillo*, 316 F.2d 606 (2d Cir.), *cert. denied*, 375 U.S. 822, 84 S.Ct. 60, 11 L.Ed.2d 55 (1963)] is misplaced if the object of the proposed cross-examination of Lehman was to question more than his general credibility. As the court pointed out in *Cardillo* there is a difference between general credibility and answers which might possibly establish untruthfulness with respect to the specific crime charged. 316 F.2d at 613." It then concluded: "The defense in this case was not attempting to impeach the testimony of Lehman by a general attack on his credibility, but this was an example of a more particular attack relating to issues and personalities in the case at hand as described in *Davis v. Alaska, supra.*"

There are, of course, striking similarities between the facts of *Garrett* and the circumstances of this case. Here, however, defense counsel has suggested no "line of reasoning" *(Davis, supra*, 415 U.S. 317, 94 S.Ct. at 1111, 39 L.Ed.2d at 354) that would make the policeman's testimony suspect aside from the general inference, of limited probative value, that those who lie once may lie twice. When the evidence excluded is of such inherently limited prohibition,

the sixth amendment is not violated by failure to admit it. While this testimony might nonetheless have been helpful to the jury, we cannot hold that the sixth amendment is coextensive with the Federal Rules of Evidence or that it terminates the discretion of a state judges to decide on the desirability of admitting such testimony into evidence.

The judgment is AFFIRMED.

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMMETT EUGENE CLOUD, JR.

VS. CA-78-0947-H

CARL THOMAS, SHERIFF

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

Pursuant to the provisions of 28 U.S.C. 636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate, as evidenced by his signature thereto, are as follows:

Findings and Conclusions:

Type Case: This is a petition for Writ of Habeas Corpus relief by an individual attacking a State conviction pursuant to Title 28 U.S.C. §2254.

Parties: Petitioner, Emmett Eugene Cloud, Jr., was at the time of the filing of the instant application an inmate in the Dallas County Jail serving a misdemeanor conviction for the offense of public lewdness. Petitioner has finally discharged service of this sentence.

Respondent is the Sheriff of Dallas County, Texas, and is empowered by State law to incarcerate individuals convicted of misdemeanor offenses against the laws of the State of Texas.

Statement of the Case: Upon his plea of not guilty the Petitioner was tried pursuant to an information filed in

Cause No. CCR76-782 charging him with the offense of public lewdness, a Class A Misdemeanor. The jury found Petitioner guilty and assessed punishment at a fine of $1500.00 and confinement in the Dallas County Jail for a period of six months.

Petitioner effected a direct appeal from his conviction, and the Texas Court of Criminal Appeals affirmed his conviction in *Cloud v. State*, 567 S.W.2d 801 (Tx. Crim.App. 1978). Petitioner's Motion for Rehearing was denied on July 19, 1978.

The sole ground raised in the instant application is the same ground previously raised in his direct appeal, to wit: the trial court's refusal to permit cross examination of the prosecution's sole eyewitness to the offense concerning the witness's filing of a false police report thus violating Petitioner's right to confront the witness in violation of Petitioner's Sixth and Eighth Amendment rights.

Respondent has answered and has moved to dismiss the present application on the ground that Petitioner has failed to exhaust available state remedies. Respondent has not filed an accompanying brief in support of his motion to dismiss, but it would appear that Respondent's motion is predicated on the fact that after having obtained a final conviction by reason of the Court of Criminal Appeals action in affirming, the Petitioner has not resorted to State courts pursuant to the provisions of Articles 11.07 and 11.09 of the Texas Code of Criminal Procedure.

Findings and Conclusions: Having raised the sole issue in his direct appeal and having failed to obtain relief from the Texas Appellate Court, Petitioner is not required to institute a collateral attack on his conviction in the courts

of the State of Texas. See *Burton v. Oliver*, —— F.2d ——, No. 79-2562 (6th Cir. dec. July 3, 1979). Accordingly, Petitioner has exhausted available state remedies and his application is properly before the Court on the merits.

At trial Thomas Q. Akins, a Dallas Police Officer, testified that he observed the Petitioner and a second male engaged in an act of deviate sexual intercourse. Petitioner took the stand in his own behalf and denied that he had engaged in any indecent conduct, although he did admit to having been at the Bachelor Quarters Health Studio on April 29, 1975, at which time he was arrested by members of the Vice Section of the Dallas Police Department. Petitioner's counsel attempted to impeach the testimony of Officer Akins by demonstrating that on December 8, 1975, the officer had filed a false report concerning another officer in a Vice Squad undercover operation. Before permitting testimony concerning this collateral matter to be heard by the jury, the trial court conducted a *sub rosa* hearing and after having heard the testimony and Petitioner's counsel's argument, sustained the prosecution's motion in limine filed prior to trial, and refused to permit the Officer to be cross examined on this collateral matter. (Statement of Facts, pages 34-46, at pages 40-44). Based upon the testimony developed out of the jury's presence the trial court held that counsel could not make such inquiry, but noted that this ruling was subject to change if counsel presented some authority to support the propriety of allowing this type of cross examination. The record reflects that no further authority was presented, nor was any further effort made to expand or clarify the circumstances surrounding the December 8, 1975, report.

It is well settled that the scope and extent of cross examination is within the discretion of the trial court and

the court's limitation on cross examination will not be disturbed absent an abuse of discretion.

There are two critical aspects which bear on the relevancy and the probative value of the evidence which Petitioner sought to present to the jury. In the first instance it is to be noted that the alleged falsified report was filed some eight months subsequent to Petitioner's arrest. Second the false report was about another officer in a vice undercover operation rather than a criminal investigation report concerning a person suspected of criminal activity. *Cloud v. State, supra,* at page 802.

Petitioner's argument predicated on the decision in *Hutchings v. State,* 518 P.2d 767 (Alaska, 1974), wherein it was held that the defense should have been permitted to examine a witness in an effort to show that the witness's testimony was influenced by the witness's attempt to curry favor with his superiors, at first blush is appealing. However, under the circumstances in the instant case this speculative grounds for admission has little probative value since the police officer filed charges shortly after Petitioner's arrest, long before the incident which resulted in disciplinary action being taken against the testifying officer (Id. at page 803). See also *Smith v. State,* 516 S.W.2d 415 (Tx. Crim. App. 1974).

The balancing of interests in determining whether an item of evidence is admissible is applicable to the prosecution's interest as well as to the interest of an accused. The trial court must balance the probative value of the evidence sought to be introduced against the risk its admission may entail. The potential risk include the possibility of undue prejudice, embarrassment or harassment to either a witness or a party, the possibility of misleading or confusing a jury,

and the possibility of undue delay or waste of time. Cf. Rule 403 and 608(b) Federal Rules of Evidence.

At bottom the probative effect which Petitioner seeks to attach to the unadmitted testimony is extremely speculative, particularly in light of the amount of time which had passed and the context of the alleged false statement as compared with the context in which the witness observed the Petitioner. Based upon all of the evidence before this Court as reflected in the record of State Court proceedings, it cannot be said that the trial court abused its discretion or denied Petitioner's constitutional rights in limiting Petitioner's cross examination of the witness at trial.

Recommendation:

For the foregoing reasons it is recommended that Petitioner's application for Writ of Habeas Corpus be denied and dismissed.

Wm. F. Sanderson, Jr.
United States Magistrate

B-6

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

EMMETT EUGENE CLOUD, JR.

VS. CA3-78-0947-H

CARL THOMAS, SHERIFF

ORDER

After making an independent review of the pleadings, files and records in this case, and the findings, conclusions and recommendation of the United States Magistrate, I am of the opinion that the findings and conclusions of the Magistrate are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that the Findings, Conclusions and Recommendation of the United States Magistrate are adopted.

SIGNED AND ENTERED this 27 day of August, 1979.

/s/ Barefoot Sanders
United States District Judge

C-1

Emmett Eugene CLOUD, Jr., Appellant,

v.

The STATE of Texas, Appellee.

No. 54036.

Court of Criminal Appeals of Texas,
Panel No. 1.

May 10, 1978.

Rehearing En Banc Denied July 19, 1978.

Before TOM G. DAVIS, DALLY and W. C. DAVIS, JJ.

OPINION

DALLY, Judge.

This is an appeal from a conviction for public lewdness. V.T.C.A. Penal Code, Sec. 21.07(a) (2); punishment is confinement in the county jail for six months and a fine of $1,500.

A Dallas police officer testifed that he saw the appellant commit an act of deviate sexual intercourse in the steam room of the Bachelor Quarters Health Studio on April 29, 1975. The appellant denied he had committed the act. Other than the appellant, the only witness whose testimony directly concerned the alleged offense was the police officer.

The appellant in his sole ground of error asserts that he was denied his constitutional right to the confrontation of the witness because the court restricted appellant's right to cross-examine the officer. The appellant's counsel was permitted to fully cross-examine the officer concerning all of his testimony on direct examination. The appellant was not denied his constitutional right of confrontation and cross-

examination. The issue presented is whether the court erred in refusing to allow appellant's counsel to question the officer about a collateral matter in an effort to impeach and discredit the officer's testimony.

The collateral matter is that on December 8, 1975, the officer had filed a false report about another officer in a vice undercover operation. The officer had said he did not hear a gun shot when in fact he did. As a result of making the false report the officer was suspended without pay for fifteen days and transferred from the vice squad to the traffic section.

Since the officer's testimony was the only incriminating evidence against the appellant, the appellant argues that he should have been allowed to show that the officer had been suspended and why he had been suspended as bearing on the accuracy and truthfulness of his testimony. Appellant further argues that this evidence was admissible to support an inference that the officer was in a position where he might be pressured to obtain a conviction in order to curry favor with his superiors and enhance his police career. The appellant cites numerous authorities including *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Evans v. State*, 519 S.W.2d 868 (Tex.Cr.App. 1975); *United States v. Fowler*, 151 U.S.App.D.C. 79, 465 F.2d 664 (1972); *Evans v. State*, 550 P.2d 830 (Alaska 1976).

The State had filed a motion in limine requesting the court to exclude the evidence relating to the officer's suspension. This motion was granted by the court prior to trial. However, during the trial, out of the presence of the jury, the court gave appellant's counsel an opportunity to offer this evidence. The court told appellant's counsel that if before the end of the trial they could produce authority to

show that this evidence was admissible, it would be admitted. The record does not reflect that counsel's position was supported by authority. The only evidence offered for the bill of exceptions was the testimony of the police officer in which the evidence involving his suspension was elicited. No extrinsic evidence relating to the officer's suspension was offered.

[1, 2] Great latitude should be allowed the accused to show a witness' bias or motive to falsify his testimony. *Blair v. State*, 511 S.W.2d 277 (Tex.Cr.App.1974); *Seal v. State*, 496 S.W.2d 621 (Tex.Cr.App.1973); *Hooper v. State*, 494 S.W.2d 846 (Tex.Cr.App.1973); *Burkhalter v. State*, 493 S.W.2d 214 (Tex.Cr.App.1973); *Kohler v. State*, 490 S.W.2d 592 (Tex.Cr.App.1973); *Wood v. State*, 486 S.W.2d 359 (Tex.Cr.App.1972). However, trial courts have considerable discretion as to how and when bias may be proved and as to what collateral evidence is material for that purpose. *United States v. Robinson*, 174 U.S.App.D.C. 224, 530 F.2d 1076 (1976); *United States v. McCann*, 465 F.2d 147 (5th Cir. 1972); *Nutter v. United States*, 412 F.2d 178 (9th Cir. 1969), cert. denied, 397 U.S. 927, 90 S.Ct. 935, 25 L.Ed.2d 107; *United States v. Higgins*, 362 F.2d 462 (7th Cir. 1966), cert. denied, 385 U.S. 945, 87 S.Ct. 316, 17 L.Ed.2d 224; cf. *Aetna Insurance Co. v. Paddock*, 301 F.2d 807 (5th Cir. 1962).

[3, 4] The extent to which a witness may be cross-examined for the purpose of showing bias on a collateral matter rests on the sound discretion of the trial judge. *Howell v. American Livestock Insurance Co.*, 483 F.2d 1354 (5th Cir. 1973); *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1930). The trial judge must balance the probative value of the evidence sought to be introduced against the risk its admission may entail. The potential

risks include the possibility of undue prejudice, embarrassment or harassment to either a witness or a party, the possibility of misleading or confusing a jury, and the possibility of undue delay or waste of time. *Howell v. American Livestock Insurance Co.*, supra; *United States v. 412.93 Acres of Land*, 455 F.2d 1242 (3rd Cir. 1972). Cf. Rules 403 and 608(b), Federal Rules of Evidence.

[5] It is far from clear that the testimony elicited from the witness for the bill of exceptions would have discredited the officer. The officer filed the charges swearing that the appellant committed the offense prior to the events which led to the officer's suspension. When the charges were filed the officer was not trying to redeem himself or to curry favor with his superiors as a result of a matter for which he was suspended. The officer's testimony supported the charge he filed. It is, therefore, very speculative to say that his testimony concerning this alleged offense was any different than it would have been if he had not been suspended.

Recently we held that a trial court did not err in refusing to admit evidence that the principal witness, who was the complainant in a robbery case, had been discharged from his employment six months after the robbery because a bag of money for which he was responsible disappeared and he failed a polygraph test. This evidence had been offered to show bias of the witness and a motive for fabricating his testimony in accusing another for loss of money for which the witness was responsible. *Smith v. State*, 516 S.W.2d 415 (Tex.Cr.App.1974).

While the trial judge in his discretion may have admitted the evidence in the instant case to show a possible bias of the officer, we do not find that he abused his discretion in refusing to admit the evidence.

The judgment is affirmed.

PHILLIPS, Judge, dissenting on appellant's motion for leave to file motion for rehearing.

The majority denies appellant's motion for leave to file motion for rehearing. On original submission, this Court held that the appellant was not entitled to cross-examine a police officer concerning his suspension without pay from the Police Department for falsifying a report. On appellant's motion for leave to file motion for rehearing, he urges reconsideration of the original opinion. After studied consideration, I agree with appellant's contention and would grant his motion.

The State's evidence at trial concerning the offense was provided by Officer T. Q. Akins, a Dallas police officer. Prior to trial, the State filed a motion in limine to prevent the appellant from referring to any acts of discipline, including interdepartmental transfers, concerning Officer Akins and several other officers, which motion was granted. At trial, the appellant developed on a bill of exceptions that Officer Akins, three and a half months before trial, had filed a false report concerning another officer in the vice squad. Officer Akins was subsequently suspended without pay for 15 days and transferred to the Traffic Division as a disciplinary matter.

The appellant sought to show by this proffered evidence that Akins was in a position after this disciplinary action where he sought to redeem himself in the eyes of his superiors and may have colored his testimony in order to establish a good record. Appellant argued he was entitled to show the disciplined officer's testimony may have been motivated by his desire to "work himself back into the good graces" of his superiors.

This Court has most recently and most thoroughly discussed this issue raised by appellant in *Castro v. State*, 562 S.W.2d 252, a case we failed to cite in our original opinion. In *Castro*, we stated:

"As this Court has stated many times, great latitude should be allowed a defendant in showing *any* fact which would tend to establish ill feelings, bias, motive and animus upon the part of any witness testifying against him. *Jackson v. State*, 552 S.W.2d 798 (Tex.Cr.App. 1977); *Robinson v. State*, 550 S.W.2d 54 (Tex.Cr.App.1977); *Simmons v. State*, 548 S.W.2d 386 (Tex.Cr.App.1977); *Evans v. State*, 519 S.W.2d 868 (Tex.Cr.App.1975); *Smith v. State*, 516 S.W.2d 415 (Tex.Cr.App.1974); *Blair v. State*, 511 S.W.2d 277 (Tex.Cr.App.1974)

In *Blair v. State*, supra, we stated that any possible malice, bias or prejudice towards the defendant on the part of the witness is admissible to attack his credibility and to lay the groundwork for possible impeachment. The motives which operate on the mind of a witness when he testifies are never regarded as immaterial or collateral matters [footnote omitted]. The defendant may prove facts 'which tend to show bias, interest, prejudice or any other mental state or status which fairly construed might tend to affect his credibility.' See - Branch's Ann.P.C. 2d Ed. Sec. 185.

* * * * * *

. . . By presenting evidence to the jury that, while Rhoades [key prosecution witness] had participated in some criminal offense and had been arrested for robbery and murder and indicted for theft, but that those charges were no longer pending against him, appellant sought to

show that Rhoades had some interest and motive in testifying for the State. The inference that the jury *could* have drawn was that Rhoades had a personal interest in helping the prosecution prove its cases against appellant and, therefore, may have been an unreliable witness. While the jury may have chosen to reject such an inference, especially since Rhoades denied that he was testifying for the State because of his vulnerable status, this evidence was nevertheless admissible and appellant should have been permitted to prove these facts. [citations omitted]"

In the instant case, the inference the jury could have drawn was that Akins' testimony was prompted by his desire to promote his own career and his testimony was slanted in an attempt to obtain a conviction and get his floundering career back on course. As we stated in *Castro*, the jury may well have chosen to reject any such inference, and yet, this evidence should have been admitted.

It is fundamental that a primary interest of the Sixth Amendment right to confrontation is the right of cross-examination. As stated by the United States Supreme Court in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974):

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i. e., discredit, the witness. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing pos-

sible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant, as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence § 940, p. 775 *(Chadbourn* rev. 1970). *We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy,* 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959). (emphasis added)

* * * * * *

We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Greene's testimony . . . .

* * * * * *

. . . On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . ."

I reiterate the holding in the original opinion that cross-examination is subject to the discretion of the trial court. As noted in *Davis,* that discretion is to "preclude repetitive and unduly harassing interrogation." As earlier stated by the

United States Supreme Court in *Alford v. U. S.*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed 624 (1930):

> "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. [citations omitted] but no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him. [citations omitted] But no such case is presented here. The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error."

In the instant case, we should hold that the appellant was entitled to explore Officer Akins' possible bias or motive for testifying against the appellant. Having failed to allow the appellant to delve into this matter deprived him of his right to reasonable cross-examination.

Appellant's motion for rehearing should be granted and the judgment reversed.

D-1

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-3368

D. C. Docket No. 3-78-0947-H

EMMETT EUGENE CLOUD, JR.,
Petitioner-Appellant,

versus

CARL THOMAS, SHERIFF, DALLAS COUNTY, TEXAS
Respondent-Appellee.

Appeal from the United States District Court for the
NORTHERN DISTRICT OF TEXAS

Before RUBIN, HENDERSON and REAVLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 10, 1980
A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals,
Fifth Circuit

By Sarah L. Holmer
Deputy
New Orleans, Louisiana